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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 14, 2013
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

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Plaintiffs hereby reply, in the first part of this brief, to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment regarding the legal duty aspect of their Administrative Procedure Act ("APA") claims for Notice and medical care. (("Motion") Docket No. 490.) The Motion was directed to Defendants Department of Defense ("DOD") and Department of the Army. Defendants filed an Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment ("Opposition" or "Cross-Motion" depending on context). (("Opp.") Docket No. 495.)

Plaintiffs hereby oppose, in the second part of this brief, Defendants' Cross-Motion. In addition to the DOD and Army, Defendants Department of Veterans Affairs ("DVA") and Central Intelligence Agency ("CIA") have moved for summary judgment in the Cross-Motion on claims against them.

INTRODUCTION

Plaintiffs are entitled to a partial summary judgment that Defendants DOD and Army have legal duties to provide Notice and medical care to veterans who participated in chemical and biological weapons testing while in service. Plaintiffs' Opening Brief showed that these legal duties arise from the plain meaning of Defendants' own regulations and directives. In their Opposition, Defendants deny they have such duties, arguing against their own words and against this Court's prior rulings construing the meaning of those words. Defendants offer nothing new that should persuade the Court to reverse its rulings. The Court should grant Plaintiffs' Motion on this limited issue of legal duty.

Defendants' Cross-Motion should be denied. There too, they recycle legal arguments this Court has already rejected. For instance, the Court has held that Plaintiffs state cognizable claims under APA section 706(1) and that Plaintiffs' medical care claims are not properly characterized as seeking money damages. DVA for a *third time* attacks Plaintiffs' bias claim under section 511. DVA also fails to recognize genuine issues of material fact concerning its bias, including its own extensive testing with the same substances used during the testing programs.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. DEFENDANTS ARE LEGALLY REQUIRED TO PROVIDE NOTICE.

The DOD and Army are legally required to provide Notice to test subjects, pursuant to their own unambiguous regulations and directives.

A. Defendants' Own Regulations and Directives Have the Force of Law Under the APA.

Plaintiffs' Opening Brief showed that Defendants' duties arise from their own regulations and directives, which have the force of law. (*See* Motion at 11, 13 (citing January 19, 2010 Order Denying Defendants' Motion to Dismiss in Part ("Jan. 19, 2010 Order") (Docket No. 59) at 15; May 31, 2011 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("May 31, 2011 Order") (Docket No. 233) at 9).) Defendants respond that the pertinent regulations and directives lack "the force of law" and thus, "may not serve as the basis for a section 706(1) claim." (*See* Opp. at 14-17.) The Court has considered this argument twice before and rejected it: "as this Court stated in its January 19, 2010 Order on Defendants' first and second motions to dismiss, Army regulations have the force of law." (May 31, 2011 Order at 9 (internal citations omitted).) The Court held that "AR 70-25 (1962), as a provision of law, supports Plaintiffs' claim." *Id.*

Legal sources less formal than regulations, such as the Wilson Directive and CS: 385, can also be the foundation of duties enforceable under APA section 706(1). For example, an agency "plan" can "itself create[] a commitment binding on the agency" if there is a "clear indication of binding commitment in the terms of the plan." *See Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 69, 71 (2004); *see also Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006) (finding the "agency went out of its way to make clear it was committing to a certain process, and withdrawing from that 'compact with the public' would appear to subject the agency to suit under § 706(1)").

Defendants' "binding commitment" is clear on the face of the Wilson Directive and CS: 385. The Court has previously concluded that "[b]oth [CS: 385 and AR 70-25 (1962)]

provided that medical treatment and hospitalization '*will be provided* for all casualties' of the experiments." (*See* May 31, 2011 Order at 4 (emphasis added).) Both CS: 385 and the Wilson Directive use language that is indicative of a binding commitment (setting forth what the agency "will" and "shall" do), and that language is, in fact, similar or identical to the language in AR 70-25, which the Court has already ruled has the force of law and creates duties that can be enforced under the APA. (*See, e.g.*, May 31, 2011 Order at 9.) The Court has noted this, concluding that "[t]he various regulations and documents contain identical or similar provisions." (Order Granting in Part, and Denying in Part, Plaintiffs' Motion for Class Certification ("Class Cert. Order") (Docket No. 485) at 39.) In light of the fact that the Wilson Directive and CS: 385 contain the same operative language setting forth what the agency "will" do, and hence evidence the same binding commitment as AR 70-25, those directives are similarly enforceable under the APA.[1]

1. The Court Has Rejected Defendants' "Housekeeping Statute" Argument; AR 70-25 Was Not Promulgated Under Section 301.

Despite the Court's ruling that "Army regulations have the force of law," (*see* May 31, 2011 Order at 9), Defendants insist "AR 70-25 lacks the force of law and thus may not serve as the basis for a section 706(1) claim" because they argue it was promulgated pursuant to a "housekeeping statute" that cannot create "any substantive rights." (Opp. at 16-18.) But Defendants have made this "housekeeping statute" argument before too, to no avail. (*See* May 31, 2011 Order at 9-10.) In their Motion to Dismiss the Third Amended Complaint, Defendants argued that, "because AR 70-25 (1962) was promulgated pursuant to 5 U.S.C. § 301, it cannot confer an entitlement, such as medical care." (*Id.*) The Court acknowledged that under

[1] Defendants also assert, without legal authority, that "[b]ecause CS: 385 and AR 70-25 are Army documents, they may not serve as the basis for any legal obligation on the part of the Department of Defense." (Opp. at 16 n.16; *see also* Opp. at 37 (same contention regarding medical care).) It is unclear how DOD can claim it is not bound as a principal by one of its own departments. During discovery, "Dr. Kilpatrick served as both the Department of Defense and Department of the Army Rule 30(b)(6) designee." (Opp. at 21 n.22.) Also, the Navy and Air Force refused to produce documents under a Rule 45 subpoena on the grounds that they were parties to the litigation as departments of the DOD. (*See* Docket Nos. 299 at 4-5; 307 at 7-10; 317 at 8-10.)

Schism v. United States, 316 F.3d 1259, 1277 (Fed. Cir. 2002), "[b]ecause regulations issued pursuant to [section 301] are so limited, such regulations 'cannot authorize the creation of a benefit entitlement.'" (May 31, 2011 Order at 10.) But the Court rejected Defendants' argument because "there is nothing in AR 70-25 (1962) or Plaintiffs' complaint to suggest that the regulation was issued pursuant to section 301." (*Id.*)

Defendants now say "[t]he Army promulgated AR 70-25 pursuant to its statutory authority under 10 U.S.C. §§ 3013 and 4503." (Opp. at 17.) Defendants claim that because "Sections 3013 and 4503 were merely 'housekeeping statutes,' . . . AR 70-25 thus lacks the 'force and effect of law.'" (*Id.* at 18 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)).) But *Chrysler* has nothing to do with section 3013 or 4503; rather it deals with section 301, a statute Defendants now acknowledge was not the source of AR 70-25. *See Chrysler*, 441 U.S. 281. And their assertion that sections 3013 and 4503 are housekeeping statutes "[l]ike 5 U.S.C. § 301" is simply unsupported by any legal authority.[2] (*See* Opp. at 17-18.)

2. The Plain Meaning of the Regulation Is Not an "Interpretive Reach" as Defendants Assert.

Defendants also argue that "the fact that Plaintiffs have to define what they mean by 'Notice' strongly counsels against any conclusion that AR 70-25 expressly requires Notice in a manner that could be compelled by this Court . . . ." (Opp. at 18 ("Such interpretive reaches demonstrate that AR 70-25 does not expressly and unequivocally require the type of Notice that Plaintiffs maintain is 'non-discretionary' in this case.").) But as explained in Plaintiffs' Opening Brief, the Notice mandated by Defendants' regulations and directives is clear from their plain meaning. There is nothing ambiguous about AR 70-25 requiring that test subjects be told the "nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected" and "the effects upon [their] health or person which may possibly come . . . ." AR 70-25 ¶ 4.a.(1) (1962) (Declaration of Ben

[2] Defendants grudgingly do admit that "AR 70-25 may *appear* to contain substantive rules . . . ." (Opp. at 16 (emphasis added).)

Patterson in Support of Plaintiffs' Motion for Partial Summary Judgment ("Patterson Decl.") Ex. 1). The Court's prior rulings, including that "[t]he Wilson Directive and versions of AR 70-25 mandate that Defendants provide information to the test participants regarding the possible effects upon their own health or person" (Class Cert. Order at 47), are not "interpretive reaches" as Defendants assert.

B. The Court Has Correctly Ruled that Defendants' Duty Is Not Limited to the Time of the Testing: Defendants Have an Ongoing Duty to Provide Notice.

Plaintiffs' Opening Brief explained that the ongoing nature of Defendants' duty to provide Notice is clear from AR 70-25, and that "Defendants' legal duty to provide Notice extends to *all* test subjects." (*See* Motion at 9 (citing Class Cert. Order at 39-40).) Defendants respond that the pertinent regulations and directives do not create "***any*** ongoing legal obligation to provide information to test participants." (Opp. at 15 ("The plain language of the Wilson Memorandum requires only that sufficient information be provided to test subjects to enable them to make informed decisions as to whether to participate in the tests, not any continuous obligation lasting years after the tests took place.").) Once again, the Court has considered this argument and properly rejected it.

The Court has analyzed the language of AR 70-25 (1990), holding that, "by its terms, the section in the 1990 regulation regarding the duty to warn contemplates an *ongoing duty* to volunteers *who have already completed their participation* in research." (Class Cert. Order at 40 (emphasis added).) The Court's interpretation of AR 70-25 based on its plain meaning is correct. AR 70-25 (1990) states that "Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any *newly acquired information* that may affect their well-being when that information becomes available." (Class Cert. Order at 4-5 (quoting AR 70-25 § 3-2.h. (1990)) (emphasis added).) Indeed, this "duty to warn exists *even after* the individual volunteer has

completed his or her participation in research."[3] (*Id.* at 5 (emphasis added).) Defendants give no persuasive reasons why the Court should abandon its rulings.

Relatedly, Defendants also reargue that none of the regulations or directives can apply to tests that occurred before their effective date. (Opp. at 15 n.15, 16, 19-20.) They contend "there is no basis to conclude that the [Wilson Directive] could apply retroactively or cover testing that occurred before 1953." (*Id.* at 15 n.15.) Defendants also argue that "the 1990 version of AR 70-25 does not clearly and unambiguously establish a retroactive Notice obligation on the part of the Army for former volunteer service members whose tests concluded decades earlier . . . ." (*Id.* at 19.)

Defendants miss the point (again). The issue is not retroactivity. As the Court concluded when it recently rejected this argument, "Plaintiffs do not seek retroactive application of these obligations. . . . Instead, Plaintiffs' contention is that the regulations create prospective obligations to provide for future testing-related medical needs for all test volunteers, and an ongoing duty to warn." (Class Cert. Order at 39.) In analyzing this issue, the Court correctly found "[t]here is nothing in any version of the regulations or other documents that limits these forward-looking provisions to those people who became test volunteers after the regulation was created." (*Id.* at 39-40.) For example, the Court concluded that "the definition for human subject or experimental subject" contained in AR 70-25 (1990) "does not exclude individuals who were subjected to testing prior to the date of the regulations." (*Id.* at 40.)

In addition, while acknowledging the language of section 3-2.h. cited in the Court's Class Certification Order, Defendants insist that "section 3-2.a makes clear that this 'duty to warn' relates to tests occurring after the effective date of the 1990 version of AR 70-25 . . . ." (Opp. at 20.) But the section 3-2.a. language quoted by Defendants does not conflict with the Court's interpretation that "by its terms, the section in the 1990 regulation regarding the duty to warn

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[3] In its January 19, 2010 Order, moreover, the Court concluded that "AR 70-25 ¶ 4(a)(1) (1962) requires notice to the extent that it would not 'invalidate the results,' . . . . Because the results can no longer be invalidated, AR 70-25 (1962) does not give Defendants discretion concerning disclosure now." (Jan. 19, 2010 Order at 16 n.5.)

contemplates an ongoing duty to volunteers who have already completed their participation in research." (Class Cert. Order at 40.) If anything, that language further supports the Court's plain meaning analysis that AR 70-25 (1990) contains a prospective duty to warn. (*See* Opp. at 20 ("the [major Army Commands] MACOM or agency conducting or sponsoring research must establish a system which will permit the identification of volunteers *who have participated* in research conducted or sponsored by that command or agency, and take actions to notify volunteers of *newly acquired information*") (emphasis added; brackets original).)

Defendants also argue that "the applicable system of records notice (required by the Privacy Act)" somehow demonstrates that AR 70-25 does not impose "an on-going Notice obligation for participants in testing that took place before the effective date . . . ." (Opp. at 20.) They rely on two provisions from the Federal Register, neither of which is relevant to the meaning of AR 70-25 (1990).[4] As explained below, because the regulation is unambiguous, the Court need not consider sources outside the plain meaning of the regulation itself, and Defendants' post hoc litigation position is entitled to no deference in any event. The Court has already interpreted the plain meaning of the regulation to conclude that "[t]here is nothing in any version of the regulations or other documents that limits these forward-looking provisions to those people who became test volunteers after the regulation was created." (Class Cert. Order at 39-40.) Defendants' purported interpretation of AR 70-25 (1990) conflicts with the Court's prior order.

Defendants say "[t]he Army suspended testing of chemical compounds on human volunteers on July 28, 1976," and "DoD no longer conducts testing on humans using live agents." (Opp. at 2; *see also* Class Cert. Order at 40 ("Defendants maintain that the human experimentation programs ended in 1975.").) But AR 70-25 covers "[r]esearch involving

[4] Defendants say that the registry under "56 Fed. Reg. 48,168-03, 48,187 (Sept. 24, 1991)" was "developed pursuant to AR 70-25 (1990)." (Opp. at 20-21.) But this notice originated *before* the promulgation of the 1990 version of AR 70-25. *See* 53 Fed. Reg. 16575 (May 10, 1988); 56 Fed. Reg. 48187 (Sept. 24, 1991). The revised 1991 version contains only minor non-substantive edits. *Id.* In fact, the new "Categories of Individuals Covered by the System" section that Defendants quote and the "Purpose(s)" section are virtually unchanged. *Id.*

deliberate exposure of human subjects to nuclear weapons effect, to chemical warfare agents, or to biological warfare agents." AR 70-25 § 1-4.d.(4) (1990) (Patterson Decl. Ex. 2). If the pre-1977 live agent testing were excluded, this part of the regulation would have no effect. This is another reason to reject Defendants' recapitulated argument. *See Khatib v. County of Orange*, 639 F.3d 898, 904 (9th Cir. 2011) ("it is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative'" (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985))).

C. AR 70-25 Is Not Ambiguous, Nor Is Defendants' Post Hoc Rationalization Entitled to Any Deference.

Defendants then fall back on the alternative argument that "[a]t the very least, AR 70-25 (1990) is ambiguous as to whether it creates a duty to provide any kind of information contemplated by the 'duty to warn' to individuals who participated in research prior to the promulgation of the updated regulation in 1990." (Opp. at 21.) They thus insist that the Court must bow to their interpretation in light of the asserted ambiguity. (*Id.*) But as Plaintiffs showed in their Opening Brief, AR 70-25 is unambiguous, and the Court need only apply its terms as written. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 392 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 760 (2011), *and aff'd*, 132 S. Ct. 2156 (2012); *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (An agency's interpretation of a regulation "should not be considered when the regulation has a plain meaning.") (internal citation omitted).

Regardless of any asserted ambiguity, Defendants have not shown that their post-litigation interpretation deserves deference. They argue that agency interpretations "can be controlling even if advanced for the first time in a legal brief." (Opp. at 21 (quoting *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011) (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 (2011))).) But both *Chase Bank* and *Talk America* involved deference to *non-party* agencies invited by the Court to offer their interpretation. *See Chase Bank*, 131 S. Ct. at 881 (finding interpretation controlling because "[t]he Board is not a party to this case," but submitted an *amicus* brief at the Court's request, and "there is no reason to believe [its] interpretation . . . is a 'post hoc rationalization'

taken as a litigation position"); *Talk America*, 131 S. Ct. at 2263 (deferring to interpretation in invited *amicus* brief because "[w]e are not faced with a post-hoc rationalization . . . of agency action that is under judicial review").[5] Defendants are trying here to pass off their litigation position as a dispassionate interpretation of the regulation. Their litigation argument deserves no such deference. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.").

D. Defendants Have No Discretion over Whether to Provide Notice.

Defendants' regulations and directives legally require them to provide Notice: for example, test subjects "*will* be told . . . the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected" and "*will* be fully informed of the effects upon [their] health or person which may possibly come . . . ." AR 70-25 ¶ 4.a.(1) (1962) (emphasis added). Defendants argue that "the 'duty to warn' contained for the first time in the 1990 version of AR 70-25 cannot be enforced under Section 706(1) because it inherently provides the Army with substantial discretion to use its judgment to determine when and how to effectuate such a duty." (Opp. at 22-23 ("The predicate to triggering this 'duty to warn' is the necessarily discretionary scientific judgment as to when certain information 'may affect' a test participant's 'well-being.'").)[6]

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[5] *Lezama-Garcia* is also inapposite. It relied exclusively on the distinguishable *Chase Bank* and *Talk America* cases. 666 F.3d at 525 ("Such agency interpretations can be controlling even if advanced for the first time in a legal brief."). In addition, the Ninth Circuit explained that "agency interpretations of its ambiguous regulations" are *not* controlling if "there is other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Defendants' post hoc litigation position fits this category. *See Chase Bank*, 131 S. Ct. at 881. Finally, the court in *Lezama-Garcia* actually held that it owed "the government's interpretation *no deference* under *Chase Bank*" because it was "'plainly erroneous' and 'inconsistent with the regulation.'" 666 F.3d at 533 (quoting *Auer*, 519 U.S. at 461) (emphasis added).

[6] Defendants argue that AR 70-25 (1962) "vested substantial scientific discretion and judgment as to how much could be disclosed, as it did not require test administrators to reveal so much as to 'compromise the experiment' or 'invalidate the results.'" (Opp. at 18 n.18.) But the Court has previously ruled on this issue: "AR 70-25 ¶ 4(a)(1) (1962) requires notice to the extent that it would not 'invalidate the results,' . . . . Because the results can no longer be invalidated, AR 70-25 (1962) does not give Defendants discretion concerning disclosure now." (Jan. 19, 2010 Order at 16 n.5.)

Defendants misapply the APA standard. As this Court articulated: "the government can be held liable for the breach of its duty to warn, so long as the decision on *whether to warn* is not considered a discretionary act." (Jan. 19, 2010 Order at 15-16 (emphasis added) (citing *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 996-99 (9th Cir. 1987); 28 U.S.C. § 2680(a)).) The Court then correctly ruled that AR 70-25 "suggests that Defendants had a non-discretionary duty to warn" the volunteers about the "nature of the experiments." (*Id.* at 16.)

Defendants argue that they have some discretion over *how* to provide Notice. But they do not have discretion over *whether* to provide Notice. That is clear from the face of Defendants' regulations and directives—"will" means will. Indeed, the Court has previously held that "[t]he Wilson Directive and versions of AR 70-25 *mandate* that Defendants provide information to the test participants regarding the possible effects upon their own health or person." (Class Cert. Order at 47 (emphasis added).)

Agencies will always possess some inherent discretion over *how* to do something they are required to do. But that does not negate the underlying mandatory duty to act. *See Liang v. Attorney General of the United States*, No. C-07-2349, 2007 WL 3225441, at *4 (N.D. Cal. Oct. 30, 2007) (granting plaintiff summary judgment for section 706(1) claim where, although government had discretion regarding the outcome and procedural underpinnings of plaintiffs' application, it was required by statute to adjudicate the application); *see also Legal Aid Soc. of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1330-31 (9th Cir. 1979) (affirming order granting plaintiff summary judgment for section 706(1) claim where, although regulations placed "heavy reliance upon administrative expertise and discretion," the agency had a "non-discretionary duty" to comply with mandatory terms of regulation). Under Defendants' view, no statute or regulation could possess the requisite specificity necessary to create a mandatory duty under the APA. Defendants do not have discretion over "whether to warn." [7]

[7] Defendants' argument that "Even If The Court Concludes That DoD Or The Army Has A Discrete, Mandatory Obligation To Provide Notice, It May Only Order Limited Relief" (Opp. at 27-28) is irrelevant to whether they have a legal duty. The issue of the Court's power to grant relief can be taken up on a fuller record, after the Court rules on liability. Defendants' argument also does not purport to dispose of any claim; even Defendants admit there is at least some relief

(Footnote continues on next page.)

II. DEFENDANTS ARE LEGALLY REQUIRED TO PROVIDE MEDICAL CARE.

In their Opening Brief, Plaintiffs showed that Defendants' mandatory obligation to provide medical care to test subjects for all casualties is clear from the plain meaning of Defendants' own regulations and directives. (*See* Motion at 12-13.) Defendants make several unconvincing arguments in opposition.

A. Defendants' Regulations and Directives Have the Force of Law.

Defendants contend that "CS: 385 provides only a general statement of policy lacking the force of law and thus cannot support an APA 706(1) claim." (Opp. at 37.) Defendants do not appear to make the same argument regarding AR 70-25, but in any event, the Court has rejected it. (*See* May 31, 2011 Order at 9 ("Army regulations have the force of law.").) For the reasons explained in the Notice section above and in the Court's prior orders, Defendants' regulations and directives have the force of law and support Plaintiffs' medical care claims.[8]

B. The Court Has Ruled that Defendants Have a Prospective Obligation to Provide for Future Testing-Related Medical Needs for All Test Subjects.

Defendants argue that AR 70-25 obligates them to provide medical care only during the time of the testing: "because the 'added protection' concerning medical treatment and hospitalization, when read in context, relates to treatment at the time of the tests, this language cannot serve as the basis for a discrete, non-discretionary duty to provide health care to test volunteers decades after their service." (Opp. at 39.) Defendants similarly contend that the medical care requirements contained in CS: 385 were only to ensure "the safety of test participants ***during and immediately following the testing***." (Opp. at 37.)

(Footnote continued from previous page.)

the Court can order. (Opp. at 27 ("the Court could conceivably compel DoD to make a new determination and consider new information if it found that a duty existed and DoD had unreasonably delayed").) Thus, this argument is not relevant to Defendants' Cross-Motion either.

[8] Defendants' repeated, derisive mischaracterization of Plaintiffs' claim as one for "free, lifetime health care" is puzzling. (*See* Opp. at 37-38.) Plaintiffs seek no such thing. Rather, Plaintiffs seek only to require Defendants to provide medical care to test subjects for all casualties of the experiments, as their own regulations and directives mandate.

Defendants admit that the Court considered this argument before and rejected it after analyzing the regulation's pertinent provision. (*See* Opp. at 38-39.) The Court was correct. AR 70-25 (1962) requires that "medical treatment and hospitalization will be provided for all casualties." AR 70-25 ¶ 5.c. (1962); *see also* CS: 385 (Patterson Decl. Ex. 5 ¶ 6.c.) ("Medical treatment and hospitalization will be provided for all casualties of the experimentation as required."). The 1990 version of AR 70-25 similarly states that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." AR 70-25 § 3-1.k. (1990). Nothing in any version of this requirement limits the provision of medical care to only the time of the testing. As the Court concluded, "[t]he safeguards were put in place to protect a volunteer's health. The fact that symptoms appear after the experiment ends does not obviate the need to provide care." (Jan. 19, 2010 Order at 17.)

The Court's prior ruling is also consistent with elementary rules of statutory construction. Under Defendants' previously rejected construction, the medical care provision would be rendered superfluous. Military service members are already entitled to medical care during the course of service. (*See* Opp. at 34 (citing 10 U.S.C. § 1074(2)(A)).) If a service member were injured during active duty service, including being injured while a test subject, the service member would receive medical treatment. Were the regulation read as only covering medical care during a test, the regulation would serve no purpose: it would provide for medical care the test subject would receive anyway. Regulations should not be read to render them purposeless. *See, e.g.*, *Khatib*, 639 F.3d at 904.

Indeed, Defendants' regulations and directives create prospective obligations to provide for future testing-related medical needs for all test subjects. The Court has held that "[t]here is nothing in any version of the regulations or other documents that limits these forward-looking provisions to those people who became test volunteers after the regulation was created." (Class Cert. Order at 39-40.) Thus, as explained in the Notice section above, the Court rejected Defendants' footnote contention that "there is no basis to conclude that any of the sources of authority identified by Plaintiffs obligate DoD to provide health care to test participants who participated in tests before the effective date of those documents." (Opp. at 39 n.38.)

Defendants continue that the "added protection" language from AR 70-25 (1962) is "[a]t best, . . . subject to more than one reasonable interpretation" and "[u]nder these circumstances, there cannot be a discrete ministerial legal obligation that can be enforced under the mandamus-like standards of 706(1)." (Opp. at 39 (citing *LanceSoft, Inc. v. U.S. Citizenship & Immigration Servs.*, 755 F. Supp. 2d 188 (D.D.C. 2010)).)[9] As addressed above, the Court has interpreted the regulation and correctly rejected Defendants' underlying argument.

AR 70-25 is not ambiguous. The regulation clearly requires that "medical treatment and hospitalization *will be provided* for all casualties." AR 70-25 ¶ 5.c. (1962) (emphasis added). Under the applicable APA standard, then, Defendants are "required to take" the "discrete agency action" of providing medical care for all casualties. *See SUWA*, 542 U.S. at 64; *see also Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1091 (N.D. Cal. 2008) (finding that because the statute "states that a federal agency *'shall'* take into account" potential adverse effects, the DOD's obligation is "discrete agency action that is non-discretionary and specific").[10]

Piggybacking on their Cross-Motion argument, Defendants repeatedly say "[t]here is no statutory authority for the Army to provide free, lifetime health care for veterans who claimed injuries decades after they left military service." (Opp. at 38 n.36.) Defendants then contend, without legal citation, that "an interpretation of CS: 385 and AR 70-25 that permitted free, lifetime health care to veteran test participants would not be authorized by statute, resulting in those regulations being *void ab initio*." (*Id.* at 39.) Once again, Defendants mischaracterize

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[9] Defendants cite *LanceSoft* for "refusing to find [a] ministerial, non-discretionary legal obligation where [the] obligation was, at best, ambiguous." (Opp. at 39.) Defendants' use of this out-of-circuit case is imprecise and unpersuasive. The language of the regulation in *LanceSoft* was not ambiguous. Rather, it was the "circumstances" (i.e., the plaintiffs' "designation of its Form I-290B") that were "at best, ambiguous." 755 F. Supp. 2d at 193.

[10] Defendants argue that because AR 70-25 (1990) "provides that '[t]he Surgeon General (TSG) will . . . [d]irect medical followup ***when appropriate***,' . . . such followup is exclusively a matter of the Surgeon General's scientific judgment and discretion, which, as explained above, renders that requirement insufficient to impose a uniform, mandatory obligation . . . ." (Opp. at 38 n.37 (internal citation omitted).) As addressed in the Notice section above, that there is some agency discretion regarding *how* to act does not preclude a 706(1) claim; what matters for APA purposes is that Defendants have no discretion over *whether* to act. *See* Jan. 19, 2010 Order at 15-16 (citing *Atmospheric Testing*, 820 F.2d at 996-99); *see also Liang*, 2007 WL 3225441, at *4. In this instance, the regulation's use of "will" clearly imposes a duty to act.

Plaintiffs' claim. Plaintiffs do not seek "free, lifetime health care." Furthermore, as explained in more detail in Plaintiffs' Opposition below, Defendants' argument that they lack statutory authority to provide medical care is not supported by their cited authority, contradicts the Court's previous findings (*see* Jan. 19, 2010 Order at 17), and conflicts with the clear terms of the regulation and directive.[11] Defendants cannot use their own post hoc rationalizations to avoid obligations clear on the face of the applicable regulations and directives.

Defendants also contend that "[i]f CS: 385 contemplated long-term health care for all test participants, one would expect that it would have provided a framework under which such broad-based health care would be administered." (Opp. at 37.) Because the directive's plain meaning unambiguously requires medical care, the Court need not consider such extrinsic speculation. But more fundamentally, the fact that the Army did not "establish a system for applying for eligibility, an adjudication process, a due process appeals mechanism," etc. (Opp. at 37), only supports the fact that Defendants have unlawfully withheld performance of their legal duty. In fact, Defendants admit as much: "There is no genuine issue of material fact regarding whether DoD has provided health care to test participants in the manner urged by Plaintiffs. *See* Ex. 50 (Defs' Resp. to Pls' Req. for Admissions No. 1)." (Opp. at 39 n.39.)[12]

[11] In any event, as addressed below, 10 U.S.C. § 1074(c)(1) specifically authorizes the military to provide medical care "to persons entitled to such care by law *or regulations*," and AR 70-25 is indeed a regulation. (Emphasis added.)

[12] Given Defendants' admission, if the Court grants Plaintiffs' Motion concerning Defendants' legal duty to provide medical care, it should enter summary judgment against Defendants on Plaintiffs' entire APA medical care claim.

OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Because Defendants have not established that they are entitled to judgment on any of Plaintiffs' claims, the Court should deny Defendants' Cross-Motion for Summary Judgment in its entirety.

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' APA CLAIM FOR NOTICE.

A. Plaintiffs Challenge Defendants' Failure to Provide Notice, Not the Sufficiency of the Government's Efforts.

This Court has held that Plaintiffs' APA Notice claim is cognizable under section 706(1). (*See* Jan. 19, 2010 Order at 14-16.) Nevertheless, Defendants argue that this claim is "unreviewable" under section 706(1) because Plaintiffs' "true challenge" is to the sufficiency of Defendants' outreach efforts, and not Defendants' failure to comply with their own regulations. (Opp. at 13-14.) Defendants' argument is as wrong as it is disingenuous.

Plaintiffs challenge Defendants' failure to act, not the "sufficiency" of their efforts. Defendants do not and cannot argue that they have fulfilled their duty to provide class members with Notice. (*See* Class Cert. Order at 23-24.) Nor can they claim they have made *any* effort to do so pursuant to their regulations and directives. Indeed, they dedicate thirteen pages of their brief to *denying* that there ever was such a duty. (Opp. at 14-27.)

Sure, DVA engaged in some outreach efforts. But neither DOD nor the Army has provided any authority to support the idea that the actions of *another agency* somehow relieve them of their legal obligations. (*See* Class Cert. Order at 23 ("the letters from the DVA were not sent by the DOD and the Army").) In any event, whatever efforts the government undertook are irrelevant to whether the DOD and Army have fulfilled their duties. They do not dispute that those efforts had nothing to do with the applicable regulations.[13] And they never explain, or offer

[13] In fact, the description of the government's efforts in the Statement of Facts makes no mention of any regulation. (*See* Opp. at 1-10.) And Defendants' witnesses testified that the DOD's and Army's efforts were not undertaken pursuant to the applicable regulations. (*See* Declaration of Ben Patterson in Support of Plaintiffs' Reply in Support of Motion for Partial Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment ("Patterson Reply Decl.") Ex. 14 at 240:5 – 242:3, 244:16 – 245:7 (Dee Dodson Morris Tr.); Ex.

(Footnote continues on next page.)

legal authority to show, why those efforts should be credited toward the fulfillment of a duty they claim they never had.

Thus, the one case Defendants do cite, albeit without discussion of its facts or legal reasoning, is irrelevant. In *Ecology Center, Inc. v. U.S. Forest Service*, the Ninth Circuit rejected the plaintiff's 706(1) claim where the agency merely failed to conduct its duty in "strict conformance" with the applicable statute and regulations but nevertheless had performed "extensive" efforts pursuant to that duty. 192 F.3d 922, 926 (1999). Unlike the agency in *Ecology Center*, the government's efforts here were neither extensive nor done pursuant to Defendants' regulatory duty. *See id.*[14] Defendants here point to efforts unrelated to their legal obligations, and suggest that those actions somehow relieve them of their legal duty to provide Notice. This is not simply a failure of "strict conformance," but rather total non-conformance.

In sum, Defendants deny they have any regulatory duty, and thus have not taken any actions to fulfill their regulatory duty. Defendants' failure to fulfill their duty to provide Notice is properly reviewable under section 706(1). Throughout this case, the Court has been well aware of the government's efforts. Defendants do not justify why the Court should reverse its ruling that Plaintiffs have stated a cognizable Notice claim under APA section 706(1). (*See* Jan. 19, 2010 Order at 14-16.)

IV. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' APA CLAIM FOR MEDICAL CARE.

A. The Court Has Already Ruled That Plaintiffs Do Not Seek Money Damages.

Defendants once again argue that Plaintiffs' medical care claim, "no matter how Plaintiffs label it," is a claim for money damages and therefore not cognizable under the APA. (Opp. at 28-

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(Footnote continued from previous page.)

15 at 169:4 – 171:7 (Dr. Michael Kilpatrick Tr.); Ex. 16 at 175:10-19, 201:7-25 (Martha Hamed Tr.).)

[14] But even where an agency has undertaken some efforts pursuant to a statute or regulation, the Ninth Circuit has held that does not foreclose review under section 706(1). *See Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001) (finding unreasonable delay despite Secretary's emphasis on work completed because "[c]ompletion of other studies does not relieve the Secretary from progressing with clearly mandated studies").

30.) Defendants add nothing to their argument that this Court has not already rejected. (*See* May 31, 2011 Order at 8-10; Class Cert. Order at 25-27.)

Instead, Defendants quibble with the Court's correct interpretations of two non-binding cases, *Schism v. United States* and *Jaffee v. United States*. But as the Court noted in its class certification order, neither case "counsel[s] the result that [Defendants] urge." (Class Cert. Order at 26.) Indeed, the relief Plaintiffs seek is fundamentally different from the relief sought in those cases. Unlike the plaintiffs in *Schism*, Plaintiffs here seek to enforce a right to medical care found in Defendants' own regulations and directives and not to collect a "form of deferred compensation for their military service." (*See id.* at 26; *Schism*, 316 F.3d at 1273); *cf. Bowen v. Massachusetts*, 487 U.S. 879, 900-01 (1988) (APA did not bar plaintiff's claim because it was merely "seeking to enforce the statutory mandate itself, which happens to be one for the payment of money"). Similarly, the Court properly held that unlike the plaintiffs in *Jaffee*, "Plaintiffs' injury could not be fully remedied by money damages" and that Plaintiffs "seek to end purported ongoing rights violations, not compensation for harms that took place completely in the past." (*See* Class Cert. Order at 26-27; *Jaffee*, 592 F.2d 712, 715 (3d Cir. 1979).)

Defendants have given the Court no reason to disturb its prior orders. Thus, their attempts to reargue this issue should be rejected.

B. Defendants Have Waived Sovereign Immunity for Plaintiffs' Medical Care Claim Because the DVA System Does Not Provide an Adequate Remedy.

DOD next argues that the APA's waiver of sovereign immunity does not apply to Plaintiffs' medical care claim because DVA's "comprehensive statutory and regulatory health care system" provides an adequate remedy for this claim. (Opp. at 31.) Defendants misstate the relief Plaintiffs seek and offer no reason for the Court to reverse its ruling that there was a waiver of sovereign immunity with respect to this claim. (Jan. 19, 2010 Order at 7.)

Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial

review."[15] 5 U.S.C. § 704. Because this section's "central purpose" is to provide "a broad spectrum of judicial review of agency action," it must be given a "hospitable interpretation." *Bowen*, 487 U.S. at 903-04 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)). A remedy is not "adequate" if the alternative court is "not authorized to grant the equitable relief" that plaintiffs seek. *See Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (no adequate remedy in Court of Federal Claims for contract claim because plaintiff sought equitable relief that could not be satisfied by money damages); *see also Bowen*, 487 U.S. at 905-08 (same).

DVA medical care would not adequately redress Plaintiffs' claim. Like the Court of Federal Claims in *Tucson Airport Authority* and *Bowen*, the DVA system is powerless to grant the equitable relief Plaintiffs seek. *See Tucson Airport Auth.*, 136 F.3d at 645; *Bowen*, 487 U.S. at 905-08. Plaintiffs seek (1) a declaration that under their own regulations and directives, the DOD and Army—not DVA—have a duty to "provide medical care to test subjects for all casualties of the experiments"; and (2) a Court order requiring "DOD and Army to establish policies and procedures to ensure they comply with their duties." (Motion at 2; Docket No. 387 at 9.)[16]

The Court has already recognized that the fact that Plaintiffs are able to seek medical care from the DVA "does not necessarily relieve the DOD and the Army from being required independently to provide medical care, particularly because Plaintiffs may be able to establish that the scope of their duty may be different than that of the DVA." (Class Cert. Order at 25.)[17]

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[15] The case Defendants cite for the "adequate remedy" requirement—*United States v. Park Place Associates, Ltd.*, 563 F.3d 907 (9th Cir. 2009)—does not actually discuss it.

[16] Further, the organizational Plaintiffs, Swords to Plowshares and Vietnam Veterans of America, cannot bring their medical care claims in the DVA system. For that reason alone, the DVA system does not provide an "adequate remedy." *See Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at *8 (N.D. Cal. Jan. 10, 2008) (finding no adequate remedy in part because "Plaintiffs, as organizations seeking to protect the interests of a broad class of veterans, would be unable to bring suit in the VA system").

[17] Defendants cite no authority for the proposition that a party's equitable relief claims against one agency are precluded by the mere existence of another agency's regulatory scheme. Unlike the plaintiffs in *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), and *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983), Plaintiffs seek to enforce a discrete duty found in Defendants' own regulations and directives, and not just the Constitution or Federal Torts Claim Act. It is that duty that forms the basis of Plaintiffs' relief.

C. Defendants Are Wrong To Say There Is a "Lack of Statutory Authority" to Provide Medical Care to Class Members.

Defendants argue that "there is no statutory authority that authorizes DoD or the Army to provide free, lifetime health care for veterans who are not military or medical retirees and who claim injuries based upon tests conducted decades earlier." (Opp. at 33.) First, Defendants' reliance on cases related to service members' "entitlement to pay" or other forms of compensation is misplaced. (*See* Opp. at 32.) The Court has already pointed this out to Defendants: "Plaintiffs are not seeking medical care as a form of deferred compensation for their military service." (Class Cert. Order at 26.) The Court distinguished the pay cases on the grounds that service members in them were seeking deferred compensation for military services on the basis of contract principles. (*Id.*)[18]

While Defendants focus their argument on the purported lack of "statutory authority" to provide medical care to Plaintiffs, the cases they rely on state that service members' rights must be determined according to the governing "statutes *and regulations*" rather than the contract principles asserted in those cases. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 869 (1977) ("the rights of the affected service members must be determined by reference to the statutes and regulations governing [reenlistment bonuses]") (emphasis added); *see also Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) (citing *Larionoff*). Defendants' omission of the word "regulations" is telling because Defendants' duty to provide medical care to Plaintiffs arises precisely from their own regulations.

Further, the Court has already addressed this statutory framework. It considered whether 10 U.S.C. § 1074 conflicted with the equitable relief Plaintiffs sought under Defendants' regulations. (*See* Jan. 19, 2010 Order at 17.) The Court correctly held that there was no conflict. (*Id.* ("Although the statute creates an entitlement for active service members and certain former

[18] Similarly, *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217 (9th Cir. 2011), does not support Defendants' lack-of-authority argument. In *Gardner*, the court addressed under section 706(1) whether an agency had failed to take a discrete action it was required to take, but did not address whether the agency lacked authority to take a particular action or enact a regulation.

members to medical and dental care, it does not bar the Court from granting injunctive relief to vindicate Plaintiffs' claims."))

Defendants' attempt to reframe their argument should be rejected. As this Court previously concluded, the correct inquiry is whether there is a conflict between the regulations and congressional intent. *See Pac. Gas & Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) (IRS's interpretation of a statute and regulations was "contrary to the statute and therefore invalid and of no effect"). Even in the cases Defendants cite that actually address an agency's authority to enact a regulation, the courts focused on whether the agency's regulations *conflicted* with congressional intent. In *Larionoff*, the Supreme Court held that DOD's interpretation of its regulations was reasonable but "contrary to the manifest purposes of Congress" in enacting the bonus statute, by which Congress clearly intended to create an incentive for reenlistment. 431 U.S. at 873-74. The DOD regulations were therefore held to be invalid because they directly conflicted with congressional intent. *Id.* at 877. This Court's analysis of 10 U.S.C. § 1074, finding no conflict, is consistent with the Supreme Court's test. (*See* Jan. 19, 2010 Order at 17.) Defendants fail to demonstrate why the Court should abandon its prior ruling.

Finally, even under their theory, Defendants have express authority to provide medical care to service members such as Plaintiffs. As Defendants admit, 10 U.S.C. § 1074(c)(1), enacted in 1984, specifically authorizes the military to provide medical care "to persons entitled to such care by law *or regulations*." (*See* Opp. at 34.) AR 70-25 is a regulation that has the force of law. And it clearly mandates that "medical treatment and hospitalization will be provided," AR 70-25 ¶ 5(c) (1962), and "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." AR 70-25 § 3-1(k) (1990). A plain reading of the statute and regulations demonstrate that Defendants have the authority and a legal obligation to provide medical care to Plaintiffs. Defendants' strained reasoning and interpretation of section 1074 and AR 70-25 merit no deference. *See Larionoff*, 431 U.S. at 872 (stating that the

agency's interpretation of a regulation is not controlling if it is plainly erroneous or inconsistent with that regulation).[19]

V. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DUE PROCESS CLAIM.

Defendants attack a strawman. They once again mischaracterize Plaintiffs' due process claim against the DOD and Army, which the Court has correctly characterized as a claim brought "under the Fifth Amendment . . . [based on] Defendants' failure to comply with their own regulations and procedures regarding notice and medical care [which] deprived class members of their due process rights." (Class Cert. Order at 10.) Defendants have not addressed that claim in their motion for summary judgment. Instead, they attack conjured claims of constitutional rights to "government information" and medical care. (Opp. at 39-43.)

Defendants incorrectly assert that Plaintiffs' due process claim is a simple, broad *Houchins* claim for "a constitutional right of access to government information." (*See* Opp. at 39 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978)).) They have argued this before. (Docket No. 34 at 20 ("Plaintiffs have no constitutional right to government information[.]").) And Plaintiffs have corrected the mischaracterization before. (Docket No. 43 at 24 (Plaintiffs "do not seek relief based on FOIA or a 'constitutional right to information.' Rather, Plaintiffs assert a proper claim for relief requiring Defendants to provide information as required by their own duties and regulations.").)

Defendants also incorrectly argue that Plaintiffs assert a general constitutional right to free, lifetime health care. (Opp. at 40.) As the Court recognized, Plaintiffs assert a claim for denial of procedural due process created by Defendants' failure to comply with their own regulations and directives, which guarantee medical care for conditions related to the testing.

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[19] Defendants should not be permitted to duck their duties on the remarkable claim that they acted in an unauthorized fashion in passing the regulations at issue. Nor should the Court allow Defendants to shirk their duties by relying on the post-litigation "Secretarial Designee" regulation and DOD Instruction. (*See* Opp. at 34-36 (citing 32 C.F.R. § 108.4 (Dec. 27, 2010); DOD Instruction 3216.02 (Nov. 8, 2011)).) These documents were published 26 years after the enactment of 10 U.S.C. § 1074(c)(1), 20 years after the promulgation of the 1990 version of AR 70-25, and almost *two years after* Plaintiffs commenced their lawsuit.

(*See* Class Cert. Order at 10.) Framed this way, testing-related medical care is both a constitutionally protected interest and a remedy for Defendants' due process violations. Defendants also assert that Plaintiffs inappropriately seek injunctive relief for past violations of their constitutional rights. (Opp. at 42-43.) This misses the point. As this Court has noted, Plaintiffs seek an injunction to remedy Defendants' continuous violations of class members' due process rights. (*See* Class Cert. Order at 26-27 (Plaintiffs "seek to end purported ongoing rights violations, not compensation for harms that took place completely in the past")); *see also Cushing v. Tetter*, 478 F. Supp. 960, 973 (D.R.I. 1979) (granting injunction against Department of Navy for violation of airman's due process rights). Defendants' remaining arguments similarly ignore Plaintiffs' actual procedural due process claim.

The Court has already recognized[20] that the Fourth Amended Complaint states a claim for denial of procedural due process.[21] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (establishing requirements for procedural due process). The Court has found that the "various regulations and documents contain identical or similar provisions" and "create prospective obligations to provide for future testing-related medical needs for all test volunteers, and an ongoing duty to warn." (Class Cert. Order at 39.) It is "a well-known maxim that agencies must comply with their own regulations." *United States v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010). A "violation by the military of its own regulations constitutes a violation of an individual's right to due process of law." *Antonuk v. United States*, 445 F.2d 592, 595 (6th Cir. 1971).

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[20] "The constitutional claims contained in [paragraphs 184-186] of the [Third Amended Complaint] were not limited to substantive due process challenges and can be fairly read to encompass procedural due process claims, particularly in conjunction with the extensive allegations of procedural deficiencies alleged elsewhere in the [Third Amended Complaint]." (Class Cert. Order at 15-16.)

[21] "Plaintiffs seek a declaration that . . . Defendants are obligated to notify Plaintiffs and other test participants and provide all available documents and evidence concerning their exposures and known health effects; and, finally, that Defendants are obligated to confer the medical care promised to Plaintiffs. . . . Defendants have unconstitutionally infringed on Plaintiffs' life, property and liberty rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that 'No person shall . . . be deprived of life, liberty or property without due process of law,' and upon Plaintiffs' right to privacy." (Docket No. 486 ¶¶ 183-84.)

Due process thus requires Defendants to comply with these regulations and directives. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (agency must comply with "existing valid regulations"); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1154-55 (9th Cir. 1988) (agency's failure to "comply with binding regulations" violated due process); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972).[22] Despite the requirements contained in their own regulations and directives, Defendants have not provided Notice or medical care. Indeed, Defendants do not even claim they have tried to do so. (*See* Opp. at 13-14, 39 n.39.) Defendants' motion for summary judgment, which does not address Plaintiffs' actual due process claim, should be denied.

VI. DVA IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' BIAS CLAIM.

A. Section 511 Does Not Bar Plaintiffs' Claim.

DVA again contends that section 511 "deprives the Court of subject matter jurisdiction to adjudicate Plaintiffs' claim that DVA's adjudicators are biased." (Opp. at 51.) Defendants do not raise any new arguments, but "respectfully submit" that the Court did not conduct a "proper analysis" in its two orders on the issue. (*Id.* at 51 n.55.)

The Court's prior rulings should stand. In both orders, the Court correctly held that while section 511 bars review of *individual* benefits determinations, the Court is not barred from reviewing Plaintiffs' institutional bias claim, the crux of which is that: "because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants. That bias, according to

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[22] While the Court certified a claim for violation of procedural due process, *see* Class Cert. Order at 38-41, Plaintiffs also have individual substantive due process claims based on a protectable life, liberty, bodily integrity, and property interest. Lack of Notice regarding Plaintiffs' exposures severely burdens their ability to seek medical care, which impermissibly burdens test participants' right to life and bodily integrity. *See Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (Due Process Clause protects right to bodily integrity); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 281 (1990) (Due Process Clause protects life interest). Defendants completely ignore this and Plaintiffs' other individual constitutional claims, including the denial of access to courts based on Defendants' failure to provide Notice.

Plaintiffs, renders the benefits determination process constitutionally defective as to them and other class members." (Class Cert. Order at 32 (citing Docket No. 177 at 11).)

DVA nevertheless insists that Plaintiffs' claim implicates "decisions that relate to benefits decisions," citing *Veterans for Common Sense v. Shinseki* ("*VCS*"), 678 F.3d 1013, 1025 (9th Cir. 2012) (en banc). (Opp. at 52.) The Court has rejected this exact argument, noting that under *VCS*, claims challenging DVA as an institution in the "generality of cases," as opposed to individual adjudication decisions made by the DVA, may be reviewed by federal district courts. (Class Cert. Order at 33-34 (quoting *VCS*, 678 F.3d at 1034-35).) Indeed, the Court specifically stated it "would have reached the same conclusion if it had had the benefit of the decision in *Veterans for Common Sense*" at the time of the Court's earlier order on Plaintiffs' Motion for Leave to File a Third Amended Complaint. (Class Cert. Order at 34.)

B. DVA Cannot Show There Is No Genuine Issue of Material Fact as to Plaintiffs' Bias Claim.

Summary judgment should be granted only "when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law." (*See* Jan. 19, 2010 Order at 17-18 (citing Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987)).) It is not the trial court's function at the summary judgment stage to weigh the evidence and determine the truth of disputed matters; the court must only determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

DVA argues that it is entitled to summary judgment "because Plaintiffs can present no evidence establishing the factual basis for their Fifth Amendment claim against VA." (Opp. at 54.) This is contrary to the evidence and to Defendants' own court filings. The following are some examples of DVA bias evidence, broadly categorized as (1) evidence regarding DVA's involvement in human testing, and (2) evidence regarding manifestations of DVA's bias.

1. DVA Was Involved in Testing Dangerous Substances on Humans.

DVA asserts that "[t]he only evidence that is relevant to [the bias claim] is evidence pertaining to the possible source of that conflict of interest—whether VA participated in the test programs or conducts tests involving some of the same substances." (Opp. at 60.) Even assuming DVA is correct—which it is not—Plaintiffs indeed have evidence of DVA's involvement in testing some of the same substances used during the testing programs. This evidence alone, which Defendants say is the "only evidence that is relevant," shows there is a genuine issue of material fact. And this evidence is not limited to "two documents from other agencies that provide *no* support for the notion that VA was involved in the test programs." (Opp. at 60 n.62.) Defendants are simply wrong to say it is "undisputed" that Plaintiffs have no other evidence of bias. (*See id.*)

First, evidence in the form of several CIA documents shows DVA's involvement in human testing, as a provider of dangerous test substances and test facilities. According to a memorandum from the CIA Director of Research and Development to the CIA Office of Inspector General regarding the "Behavioral Pharmacology program," "when testing with human subjects was required the tests would be done jointly with the Chemical Research and Development Laboratory, Edgewood Arsenal Research Laboratories (EARL), and the U.S. Army." (Declaration of Joshua E. Gardner ("Gardner Decl.") Ex. 72 at VET001_009241; *see also* Gardner Decl. Ex. 71 at VET001_009265.) And DVA was among the sources of drugs and chemicals slated for "testing in the program." (Gardner Decl. Ex. 72 at VET001_009241.)[23] DVA also hosted testing of d-amphetamine on human subjects at the Veterans Administration

[23] Defendants fail to mention that testing with EA 3167 [an anticholinergic drug related to BZ] involved fifteen military volunteers in the Edgewood program. (Gardner Decl. Ex. 72 at VET001_009242.) And Defendants' assertion that "the only tests potentially involving humans concerned the CIA's possible funding of tests involving one substance, EA-3167, rather than the CIA's administration of testing using any substances obtained from the VA," mischaracterizes the document. (*See* Opp. at 55.) In fact, the document states that Edgewood testing "focused" on that substance, not that the Edgewood testing involved *only* that substance. (Gardner Decl. Ex. 72 at VET001_009239.)

Center in Martinsburg, West Virginia, from 1960 to 1963.[24] (Gardner Decl. Ex. 74 (CIA Subproject 125 with "Cover Mechanism: Society for the Investigation of Human Ecology, Inc."); *see also* Patterson Reply Decl. Ex. 17 (1964 Martinsburg study describing Veterans Administration testing supported by Human Ecology Fund).)

Second, Defendants admitted in previous court filings that DVA tested agents that were also used during the testing programs: "Defendants admit that VA tested LSD on veterans in the past" and "Defendants admit that tests conducted in VHA research facilities include anthrax." (Defendants' Answer (Docket No. 489) ¶ 226.) These admissions are consistent with an August 6, 1975 memorandum showing there was "much use of LSD at VAH" before 1975. (Patterson Reply Decl. Ex. 18 at DVA 078 00041; *see also* Patterson Reply Decl. Ex. 19 (describing a man's "severe" psychotic reaction to LSD during a DVA study cited in Annual Report to Congress).) But DVA's use of the same chemical agents tested at Edgewood was not limited to LSD. DVA's Annual Reports to Congress show that DVA also tested mescaline, thorazine, THC, Ritalin, atropine, scopolamine, UML-491, Prolixin, Cogentin, and physostigmine. (Patterson Reply Decl. Ex. 20.)

What is more, DVA was *concerned* about the long-term health effects of such testing and the resulting claims from veterans experiencing those effects. As early as 1983, DVA began receiving a "number of inquiries" regarding its own LSD testing. (Patterson Reply Decl. Ex. 21.) And on August 28, 1992, the DVA's Director of Compensation and Pension Service stated in a memorandum to the Director of Mental Health and Behavioral Sciences Service that "we are beginning to receive applications from veterans for compensation benefits for residuals of LSD testing during military service . . . the full extent of the testing is now being realized . . . we would expect some mental disorders to be alleged. We are concerned about other related disorders. We require your assistance in identifying the expected long-term health effects of exposure to LSD."

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[24] Defendants try to minimize this document, arguing that the testing is "outside the scope of this case because it does not concern *service members*." (Opp. at 55 n.58.) Even if the participants in those specific tests are not class members, the document still shows that DVA was involved in the testing programs as a whole. And the testing was likely on veterans (i.e., "members of the Domiciliary at the Veterans Administration Center"). (Gardner Decl. Ex. 74.)

(Patterson Reply Decl. Ex. 22.) The relevance of this evidence is clear: the same agency that conducted testing of LSD was concerned about claims for benefits related to long-term health effects caused by LSD. Had DVA admitted the health effects arising from exposure to LSD and other substances it tested, it could have subjected itself to liability for testing-related injuries and to adverse publicity.

2. The Manifestation of DVA's Bias Is Shown in Other Evidence.

Despite its involvement in the testing programs and its own testing of some of the same substances, DVA was responsible for adjudicating claims for benefits based on the testing programs and exposures to those same substances. Unsurprisingly, DVA's scheme for adjudicating these claims manifested its inherent bias.

a. DVA Disseminated Outreach Materials to Discourage and Prejudge Claims.

DVA made factual misstatements in materials it distributed to key claims adjudication stakeholders, namely the veterans seeking benefits (via the "Outreach Letter" and "Fact Sheet"), the DVA regional offices reviewing their claims (via the "Training Letter"), and the medical personnel examining and evaluating the veterans (via the "Clinicians' Letter"). These material misstatements discouraged class members from filing claims and caused adjudicators and medical personnel to deny class members' claims that their ailments were caused by the testing.

The Outreach Letter and Fact Sheet

There are numerous examples of misstatements and omissions in the Outreach Letter and Fact Sheet that served to deceive class members into believing their exposures were not harmful, thereby discouraging them from filing claims for DVA benefits:

- First, the Fact Sheet that DVA included with the Outreach Letter falsely states that an Institute of Medicine (IOM) study "did not detect any significant long-term health effects in Edgewood Arsenal volunteers." (Patterson Reply Decl. Ex. 23 at VET001_014268.) The DVA opted to send out this factually incorrect document even after its own expert in chemical agent exposures, Dr. Mark Brown, told several DVA officials it contained "significant inaccuracies" and "the problem of course is that

putting [it] in a letter from DVA appears to endorse its accuracy." (Patterson Reply Decl. Ex. 24 at DVA052 000113.) As Dr. Brown elaborated, "[t]o say that there were no effects is clearly not correct and easily refutable." (*Id.*)

- The Fact Sheet also inaccurately states that Edgewood test participants received "low-dose exposures." (Patterson Reply Decl. Ex. 23 at VET001_014268.) Again, DVA opted to send out this sheet, even though the same expert pointed out this inaccuracy: "Perhaps the majority [of tests], were actually designed to cause clinical poisoning signs and symptoms." (Patterson Reply Decl. Ex. 24 at DVA052 000113.)
- The Outreach Letter states, "DVA continues to study the possibility of long-term health effects associated with in-service exposure to chemical and biological agents. If the medical community identifies such health effects, I assure you that we will share this information with you and other veterans as it becomes available to us." (Patterson Reply Decl. Ex. 23 at VET001_014267.) This implies that there are no known long-term health effects, despite DVA's own expert Dr. Brown's contrary statement, and it promises that if any health effects are discovered in the future, veterans will be notified. Based on this statement, veterans would likely be discouraged from filing claims, in reliance on DVA's assurances.
- The Outreach Letter also states that "there is no specific medical test or evaluation for the types of exposures you might have experienced more than 30 years ago." (*Id.*) This statement essentially informs veterans that even if they have health concerns because of their testing experience, there is little DVA can do to evaluate such concerns. This could only serve to discourage veterans from filing claims and coming forward for evaluation.
- Finally, as the Court recognized, neither the Outreach Letter nor the Fact Sheet addresses known "long-term psychological health effects" associated with being a test participant. (*See* Class Cert. Order at 24; Patterson Reply Decl. Ex. 23.) DVA was aware of such effects, as evidenced by the statement in the Clinicians' Letter that "[l]ong-term psychological consequences . . . are possible from the trauma associated

with being a human test subject." (Patterson Reply Decl. Ex. 25 at VET001_015608.) Despite this knowledge, DVA did not include this information in the Outreach Letter or Fact Sheet.

The Training Letter

Training Letter 06-04, sent to all of DVA's regional offices, specifies rules for adjudicating class members' benefits claims related to testing service. (Patterson Reply Decl. Ex. 26.) Because the letter contained misinformation about the known long-term health effects associated with testing and the substances used in the testing programs, DVA created a substantial likelihood of claim adjudicators prejudging class members' claims, resulting in the inappropriate denial of claims for valid health conditions caused by the testing:

- The Training Letter contains the same inaccurate statement as the Fact Sheet that the IOM study "found no significant long-term health effects in Edgewood Arsenal test participants." (*Id.* at VET001_015122.)
- This misrepresentation of the IOM findings is particularly surprising in light of an earlier draft of that line of the Training Letter, which contemplated adjudication of each claim on a case-by-case basis, recognizing that health effects depend on the particular route of exposure, duration of exposure, and dose: "Are There Any Presumptive Conditions or Common Disabilities? No. Each exposure will be considered based on current medical understanding of any long terms [sic] effects based on the type of exposure, the duration of the exposure, and dosage." (Patterson Reply Decl. Ex. 27 at DVA083 002631-33.)

The Clinicians' Letter

Inaccuracies in the Clinicians' Letter made it highly likely that medical personnel charged with evaluating class members for service-connected determinations would discount connections between class members' exposures and claimed health conditions:

- The Clinicians' Letter states that "[a]vailable evidence and follow-up study in general does not support significant long-term, physical harm among subjects exposed to

acutely toxic amounts of [agents other than mustard gas or Lewisite]." (Patterson Reply Decl. Ex. 25 at VET001_015608.)

- DVA opted to send the Clinicians' Letter Attachment even after its problems were noted internally. On July 7, 2006, DOD official Dr. Kelley Brix emailed DVA's expert Dr. Brown and several others, complaining that she found "several recurrent issues" with the letter and that "a major rewrite is required," but Dr. Brown replied that a "major rewrite is unlikely since the letter writing campaign has already started." (Patterson Reply Decl. Ex. 28.)

b. DVA Ignored Its Own Standard Procedures and Delegated All Authority to DOD.

DVA also deviated from its normal claims adjudication procedures, subjecting class members' claims to a more stringent standard than the claims of other cohorts. Specifically, DVA gave DOD "sole authority to validate whether an individual participated in any chemical or biological test." (Patterson Reply Decl. Ex. 26 at VET001_015124; *see also* Patterson Reply Decl. Ex. 29 at 52:7-10 (Joseph Salvatore Tr.) ("[W]e would send any and all documentation—what I mean by that is the claim, the service military records, and we would send them to DOD. And DOD would make the decision.").) This delegation meant that if DOD did not verify a veteran's participation in the testing programs, his claim would almost certainly be denied, even if items in the veteran's files supported participation. (*See* Patterson Reply Decl. Ex. 30 at 212:11-14 (Joseph Salvatore Tr.) ("[W]e had more denials than grants for the sole reason that most of the individuals submitting the claims were not verified by DOD as being participants."); Ex. 31 at 494:5 – 497:5 (David Abbot Tr.) ("I'm sure it was [denied]," referring to a claim by a veteran who submitted a fellow service member's statement as evidence of test participation because his own records were destroyed in a fire at a government facility); Ex. 32 (the subject of Mr. Abbot's testimony).)[25]

[25] The effects of this improper delegation are perhaps reflected in the fact that only "two of the 86 decisions . . . include a grant of service connection." (Patterson Reply Decl. Ex. 33 at DVA004 014451; *see also* Ex. 34 at DVA003 013252; Ex. 35 at VET001_000419.)

This unprecedented delegation of authority represented a stark departure from DVA's standard procedure for developing evidence for claims. (*See* Patterson Reply Decl. Ex. 36 at 37:6 – 38:13, 41:1-16 (Paul Black Tr.).) Under the operative federal regulation, 38 C.F.R. 3.303, "*all* pertinent medical and lay evidence" must be considered in evaluating a veteran's claim for service-connected disability compensation. And "[d]eterminations as to service connection will be based on review of the *entire* evidence of record." 38 C.F.R. 3.303(a) (emphasis added). This includes statements from fellow service members who corroborate in-service events (called "buddy statements"). *See Sizemore v. Principi*, 18 Vet. App. 264, 273-74 (2004) (finding DVA did not fulfill its duty to assist claimants under 38 U.S.C. § 5103A when it failed to inform claimant he could use buddy statements to corroborate alleged in-service stressors).

In other words, for all other cohorts, claim adjudicators are required to consider all pertinent medical and lay evidence, or the entire evidence of record, including a veteran's own statements and/or buddy statements submitted by a veteran. But for class members' claims related to testing, DVA ignored these mandated procedures and differentially vested all authority for confirming test participation in DOD.

C. DVA Mischaracterizes Plaintiffs' Claim and the Relief Sought.

DVA misstates the nature of Plaintiffs' claim and what Plaintiffs must show. DVA seeks to present Plaintiffs' claim as requiring the Court to review individual claims decisions, searching for a "connection" between DVA's involvement in testing and a given adjudicator's decision in an individual case. (Opp. at 56-57.)[26] But Plaintiffs do not challenge any particular individual veteran's benefits determination. (*See* Docket No. 177 at 8.)

[26] DVA asserts that Plaintiffs "cannot show any connection between" DVA's involvement in human testing and "the DVA adjudicators who actually determine whether the class members are entitled to disability benefits." (Opp. at 56 (citing *United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994)).) DVA misapplies *United States v. Oregon* to Plaintiffs' institutional bias claim. In *Oregon*, the plaintiffs claimed that one state agency biased an entirely distinct state agency. *See* 44 F.3d at 771-72. By contrast, Plaintiffs here claim that the *very same* agency's role as a participant in or perpetrator of human testing makes DVA a biased institutional adjudicator of claims arising from testing.

As the Court has found, "Plaintiffs need not establish that they were denied benefits; instead, the cause of action is based on the denial of a procedural due process right to a neutral, unbiased adjudicator." (*See* Class Cert. Order at 31 (citing *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1356 (D. Ariz. 1990)).) To prove this claim, Plaintiffs may show either an "unacceptable probability of actual bias" or the appearance of bias. *See Oregon*, 44 F.3d at 772; *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (denial of constitutional right to an unbiased tribunal may be established by showing actual bias or the "*appearance* of partiality . . . even without a showing of actual bias") (citing *Gibson v. Berryhill*, 411 U.S. 564, 568 (1973) (emphasis added)). In other words, Plaintiffs must show that the adjudicator "'has prejudged, or reasonably appears to have prejudged, an issue.'" *Stivers*, 71 F.3d at 741 (quoting *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992)). Defendants argue that "Plaintiffs *must show* that the decisionmaker has a 'direct, personal, substantial, pecuniary interest' in the outcome of the particular decision to be made." (Opp. at 58 (emphasis added) (quoting *Stivers*, 71 F.3d at 743 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 825 (1986)).) But that is not the law. The *Stivers* court itself noted that an adjudicator's "pecuniary or *personal* interest" in the outcome of the proceedings "may create an *appearance* of partiality that violates due process." *See Stivers*, 71 F.3d at 741 (emphasis added).[27]

Such is the case here. The crux of Plaintiffs' claim is that "because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants." (Class Cert. Order at 32 (citing

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[27] Citing *United States v. Willoughby*, 250 F.2d 524 (9th Cir. 1957), DVA argues the knowledge of the Veterans Health Administration ("VHA") cannot be "imputed" to the Veterans Benefits Administration ("VBA"). (*See* Opp. at 56-57, 57 n.59.) But *Willoughby*'s holding is not as broad as DVA represents. In fact, in an earlier opinion, the Ninth Circuit held that the same two branches of the DVA at issue in *Willoughby* were not "separate entities" but rather "the [Veterans] Administration itself." *See United States v. Kelley*, 136 F.2d 823, 826 (9th Cir. 1943). The *Willoughby* court merely declined to apply that holding in the face of an affirmative misrepresentation by the appellee. *See Willoughby*, 250 F.2d at 531-32. Like the DVA branches in *Kelley*, VHA and VBA are not "separate entities." *See Kelley*, 136 F.2d at 826. They worked extensively together on issues related to the testing programs. For example, the Training Letter specifically directs VBA adjudicators to send medical examiners copies of the VHA-authored Clinicians' Letter. (Patterson Reply Decl. Ex. 26 at VET001_015127.) These adjudicators in turn rely on the medical opinions colored by the Clinicians' Letter. (*Id.*)

Docket No. 177 at 11).) Furthermore, "[t]his bias, according to Plaintiffs, renders the benefits determination process constitutionally defective as to them and other class members." (*Id.*) Plaintiffs have presented evidence that DVA was involved with the testing programs, tested similar substances, disseminated outreach materials to veterans that discouraged claims, distributed internal documents substantially increasing the probability of prejudgment of claims, and rigged validation procedures by delegating all authority to DOD. This evidence creates a triable issue as to whether DVA has actual bias or has the "appearance of partiality" as an adjudicator of class members' claims.[28] *See Stivers*, 71 F.3d at 741.

Defendants also mischaracterize the relief Plaintiffs seek. Plaintiffs do not seek to "overhaul Congress's scheme for adjudicating veterans' benefits for one particular class of veterans" or to "remov[e] that critical function from the VA entirely." (Opp. at 50.) Plaintiffs simply seek to have DVA review test participants' benefits claims in an unbiased way, consistent with procedural due process. Plaintiffs' claim is that DVA is biased as an adjudicative institution; Plaintiffs do not challenge any individual adjudicator or any individual claims decision. Thus Plaintiffs seek a declaration that DVA must adjudicate anew class members' claims related to participation in testing because of due process violations, and an order requiring DVA to propose a plan to remedy those due process problems.[29]

D. Plaintiffs' Substantial Evidence of Bias Is Reviewable and Relevant.

DVA incorrectly argues that the Court should not review Plaintiffs' evidence in the form of "VA documents, practices, and procedures" because (1) "Section 511 prohibits the Court from reviewing it to determine whether it reflects 'bias' on the part of VA" and (2) it is "irrelevant to the due process claim that this Court allowed to go forward." (Opp. at 60.)

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[28] Analogizing to *Withrow v. Larkin*, 421 U.S. 35 (1975), DVA inaccurately describes Plaintiffs' institutional bias claim as "akin to one alleging that an agency that investigates and develops an initial view of facts and thereafter adjudicates decisions related to those facts is an inherently biased adjudicator." (Opp. at 58.) The more appropriate analogy is to the wrongdoer adjudicating claims related to its wrongdoing. For that reason, *Withrow* is inapposite.

[29] This relief would not, as Defendants assert, involve Court supervision of DVA's day-to-day activities, nor would the Court be ordering DVA to adjudicate claims to a certain result. (Opp. at 50-53.) In any event, Defendants' arguments are premature and better raised at the relief stage of litigation upon a fuller record.

Section 511 is not an evidentiary exclusionary rule; the Court can review evidence of institutional bias, even if it cannot review the Secretary's individual claims decisions or related decisions on issues of fact and law. Defendants cite no authority to the contrary, and their argument conflicts with the plain language of section 511.[30] Indeed, the Court has *already reviewed* such evidence. (*See, e.g.*, Class Cert. Order at 22-24 (reviewing the Outreach Letter sent to veterans, the Clinicians' Letter, and Dr. Mark Brown's e-mail regarding "significant inaccuracies" in Outreach Letter).)

Further, DVA's suggestion that such evidence is "irrelevant" is without merit and internally inconsistent within Defendants' own brief. (Opp. at 60.) On the one hand, DVA argues that "[t]he only evidence that is relevant to [Plaintiffs' bias claim] is evidence pertaining to the possible source of that conflict of interest—whether VA participated in the test programs or conducts tests involving some of the same substances." (*Id.*) As explained above, Plaintiffs have such evidence. On the other hand, DVA insists that "even if [Plaintiffs] could prove that VA participated in the test program or conducted its own testing with some of the same substances used in the test program, they cannot show any connection between those events and the VA adjudicators who actually determine whether the class members are entitled to disability benefits." (Opp. at 56.) But as explained above, Plaintiffs do not challenge any individual benefits adjudication. And to the extent any connection is required, as DVA insists in that part of its brief (Opp. at 56-58), Plaintiffs' evidence regarding manifestations of DVA's bias establishes that connection. Yet DVA incorrectly argues that such evidence is irrelevant and that the Court is prohibited from reviewing it. (*See* Opp. at 60-61.) DVA cannot have it both ways.

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[30] 38 U.S.C. § 511 states: "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." The context of "reviewed" makes clear that it refers to judicial review of a specific decision of the Secretary; that is, whether the Secretary's decision affecting the provision of benefits is contrary to law. This is supported by the reference to "mandamus" remedy later in the sentence and is consistent with the Court's prior rulings on this issue. (*See* Class Cert. Order at 32 (citing Docket No. 177 at 11) (finding that Plaintiffs do not challenge "any particular decision made by the Secretary").)

DVA's position is particularly puzzling because Plaintiffs' evidence is similar to that considered by the *Stivers* court in finding a triable issue of fact regarding the board's bias. *See Stivers*, 71 F.3d at 745-47. Central to the *Stivers* court's finding was evidence of irregularities and differences in how adjudicators treated the plaintiff compared to other applicants, which is similar to class members' disparate treatment in comparison to other veteran cohorts, as shown above. *See id.* at 746. The *Stivers* court also relied on the fact that the adjudicating board disregarded recommendations of its own experts, just as DVA disregarded the recommendations of Dr. Mark Brown and Dr. Kelley Brix. *See id.* Finally, the court considered evidence that adjudicators had "made up their minds" in advance, which is similar to the evidence that DVA prejudged class members' claims. *See id.* at 745.

In light of the representative evidence of the manifestations of DVA's bias, coupled with the evidence of DVA's involvement in the testing programs and its own extensive testing with the same substances, DVA has not demonstrated that there is no genuine issue of material fact.

VII. DEFENDANTS' RECYCLED ARGUMENTS REGARDING PLAINTIFFS' SECRECY OATH CLAIMS SHOULD BE REJECTED.

As they did in their Opposition to Plaintiffs' Motion for Class Certification, Defendants argue that Plaintiffs lack standing to assert their secrecy oath claims because there is no evidence that Plaintiffs feel "restrained in any way" from discussing their testing experience with their "health care providers" or in "pursuing claims for benefits or health care with the VA." (Opp. at 45.) Defendants miss the point.

Defendants make much of the fact that some of the Plaintiffs have discussed some of their testing experiences in certain circumstances, but as the Court noted in its class certification order, the fact that Plaintiffs "have made some disclosures about the testing . . . does not mean that they do not suffer ongoing effects of the secrecy oaths, such as a continuing fear of prosecution." (Class Cert. Order at 28.) Defendants also rely on the 2011 memorandum issued by DOD to argue that Plaintiffs have obtained the full relief they seek. But Defendants ignore the Court's instruction that it was unclear whether this "limited purpose" release allows Plaintiffs to "obtain therapeutic counseling, participate in group therapy or discuss their experiences with their

spouses or other family members, without fear of prosecution." (*Id.*) Instead, it is clear that Plaintiffs "could benefit from equitable relief that would invalidate the secrecy oaths altogether." (*Id.* at 28-29.)[31]

Further, Defendants' assertion that the secrecy oath claim is Swords to Plowshares' "only claim" is without merit. (Opp. at 50.) The allegations in the Fourth Amended Complaint show that, with the exception of the claim against DVA, Swords to Plowshares independently has all of the same remaining claims as those of the individual Plaintiffs. (*See, e.g.*, Docket No. 486 ¶ 28 ("Swords has diverted and devoted, and expects to continue to divert and devote, already scarce resources to provide additional services to veterans harmed by Defendants' actions and failures to act.").)[32]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment and deny Defendants' Cross-Motion for Summary Judgment.

Dated: February 1, 2013

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[31] Defendants now say "the CIA has provided a sworn declaration stating that the Individual Plaintiffs and VVA Members do not have secrecy oaths with the CIA and further stating that they were released from any secrecy oath that they ***believed*** they had with the CIA." (Opp. at 43.) Because this declaration listed VVA members by name, it appeared to Plaintiffs to cover only those named individuals. (*See* Gardner Decl. Ex. 51 ¶ 7.) In light of the CIA's statement that the secrecy oath release encompasses all VVA members Plaintiffs have identified, Plaintiffs have obtained the relief sought on this claim against the CIA and hereby submit that claim to the Court.

[32] Defendants similarly fail to acknowledge Kathryn McMillan-Forrest's individual claim against the DVA for bias in adjudication of her dependency and indemnity compensation claim. (*See* Docket No. 486 ¶ 87.)